

LEGAL ISSUES RELATED TO BANK REPORTING OF SUSPECTED ELDER FINANCIAL ABUSE¹

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Introduction

Since the 1990s, adult protective services (APS) workers and advocates for elder abuse victims have promoted the idea that bank personnel can prevent elder financial

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The partner organizations comprising the National Center on Elder Abuse include the National Association of State Units on Aging, the ABA Commission on Law and Aging, the Clearinghouse on Abuse and Neglect at the University of Delaware, the National Association of Adult Protective Services Administrators, the National Committee for the Prevention of Elder Abuse, and the San Francisco Consortium for Elder Abuse Prevention, Institute on Aging. For more information about the National Center on Elder Abuse, visit www.elderabusecenter.org.

Copies of this article, and of a considerably longer version that also discusses the experience in the states with both bank reporting projects and attempts to amend mandatory reporting laws to include financial institutions, are available on the websites of the National Center for Elder Abuse, www.elderabusecenter.org, and of the ABA Commission on Law and Aging, www.abanet.org/aging. Hard copies can also be ordered for a fee from the ABA, 740 15th Street, N.W., Washington, D.C. 20005, 202-662-8690,

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abuse by recognizing it and reporting their suspicions to APS and law enforcement authorities. Some states have developed “bank reporting projects” to train bank personnel to recognize and report suspected elder financial abuse (the most well known projects are in Massachusetts and Oregon). Other states are attempting to implement similar programs. Banks and other depository institutions,³ however, have traditionally resisted enactment of statutes requiring or encouraging reporting and participation in both voluntary and mandatory reporting programs, expressing concern that disclosure of confidential information regarding a customer may result in liability.

This article will help APS workers and advocates for elder abuse victims understand the legal issues that banks may raise. It examines the perceived legal obstacles to participation by banks in reporting programs and concludes that although minor amendments to state law may, in some cases, be necessary, there are no significant legal reasons why bank personnel cannot report suspected elder abuse.

Mandatory Reporting Provisions in APS Statutes

States that do not already either list banks as mandatory reporters or have universal mandatory reporting (i.e., require “any person” to report suspected elder abuse) may consider amending their adult protective services statutes to add banks as mandatory reporters as the first step in implementing a bank reporting program. However, the states that have attempted to do so have typically encountered considerable resistance from the banking industry and have not been successful.⁴ In Massachusetts and Oregon the state bankers associations strongly opposed a proposal for mandatory reporting. Both states decided to compromise on the issue, thus securing the industry’s cooperation in

³ Throughout this report, the term “banks” is used to refer collectively to banks, savings associations, and credit unions.

developing a voluntary program. As a result, both states now have very successful reporting programs, as do several other voluntary reporting states.

To address the problem of elder abuse, the legislatures of all 50 states and the District of Columbia enacted laws that establish APS programs and criteria for those services. Recognizing that elder abuse is a hidden problem, the legislature created either mandatory or voluntary reporting schemes. As of the end of 2001, all but six jurisdictions had some form of mandatory reporting requirement in their APS laws. The other six states (Colorado, New Jersey, New York, North Dakota, South Dakota, and Wisconsin) authorize voluntary reporting.

In the 45 jurisdictions that mandate reporting, the categories of persons who are required to report suspected elder abuse vary considerably from state to state. Bank personnel are mandatory reporters in three states: Florida, Georgia and Mississippi. Fifteen other states have universal mandatory reporting laws; in these states, banks are also obligated to report abuse. These states are: Delaware, Indiana, Kentucky, Louisiana, Missouri, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina,⁵ Tennessee, Texas, Utah, and Wyoming. Banks are voluntary reporters in all other states.

States that have mandatory reporting schemes have found that such a law can help prod the banking industry to support a reporting project. This has been the experience in Utah, where the APS statute requires reporting by “any person” who suspects abuse, including financial exploitation.

⁴ Virginia, New Hampshire and California are examples.

⁵ South Carolina mandates reporting only by any person “who has actual knowledge” of abuse. SC ST §43-35-25(A).

Federal Bank Privacy Laws

Banks often cite concerns about the possibility of being charged with a violation of the federal statutes that govern the disclosure of private financial records as a barrier to participation in reporting programs. However, the two federal laws most frequently cited do not prohibit reporting to APS.

The first law, the Right to Financial Privacy Act (“RFPA”), provides that in most circumstances, a customer must be given prior notice and an opportunity to challenge the government’s action in court *before* the government can obtain customer information from a financial institution. However, the RFPA applies only to the federal government and it therefore places no restrictions on the action of state and local agencies in obtaining financial records and information.⁶ Therefore, a bank can reveal customer financial information to APS or to state or local law enforcement as part of a voluntary or mandatory report of suspected financial abuse without risking prosecution for a violation of the RFPA. (The same analysis applies to a response to a request for bank records in connection with an APS investigation.)

The second law, the Financial Services Modernization Act of 1999 (popularly known as the Gramm-Leach-Bliley Act), does contain extensive privacy provisions that apply both to the federal government and to state and local governments. There are several exceptions to the Act, however, that permit the disclosure of “nonpublic personal information.” Some of these exemptions apply to mandatory reporting, voluntary reporting or both. Subsection (e)(3)(B) permits disclosure “to protect against or to

⁶ See 12 U.S.C. §3401(3), defining “government authority” as “any agency or department of the United States, or any officer, employee or agent thereof.”

prevent actual or potential fraud, unauthorized transactions, claims, or other liability.”⁷ Subsection (e)(5) permits disclosure “to the extent specifically permitted or required under other provisions of law... to law enforcement agencies... or for an investigation on a matter related to public safety.”⁸ In addition, Subsection (e)(8), which permits disclosure “to comply with Federal, State, or local laws, rules, and other applicable legal requirements,” would allow disclosures in connection with an APS investigation.⁹

In an opinion letter regarding the legality of Michigan’s bank reporting procedures, the seven federal regulatory agencies responsible for enforcement of the Gramm-Leach-Bliley Act stated that reporting suspected financial abuse falls within the exceptions to the Act that were discussed above.¹⁰ However, the opinion letter indicated the importance of Michigan’s investigation and reporting protocols as a factor in formulating the opinion, and it is uncertain whether the same result would have been reached if these protocols did not exist.

APS agencies in other states may, if appropriate, want to consider developing or revising their protocols to address reporting by bank personnel. APS agencies may also want to request a similar opinion letter about their state’s law and procedures. Agency directors, state banking officials, and other government officials may request an opinion

⁷ 15 U.S.C. §6802(e)(3)(B).

⁸ 15 U.S.C. §6802(e)(5).

⁹ 15 U.S.C. §6802(e)(8).

¹⁰ The seven agencies are Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Securities and Exchange Commission, and the Federal Trade Commission. The text of the letter is available on the websites of the National Center for Elder Abuse, www.elderabusecenter.org, and of the ABA Commission on Law and Aging, www.abanet.org/aging.

The opinion letter was issued on July 3, 2002, in response to a request from United States Senator Debbie Stabenow (D-MI).

letter from the federal agencies, or they may ask their Congressional representatives to request such a letter. Regardless of what entity solicits the opinion letter, in order to expedite the response, any request should include copies of pertinent statutes, regulations, and protocols. Agencies that do not currently have protocols may want to submit bank training and other pertinent materials in addition to their state statute(s) and regulation(s).

State Bank Privacy Laws

Most states have statutory law, case law, or both that protects the privacy of financial institution records and specifies the circumstances under which banks can lawfully disclose customer information. Statutory provisions regarding disclosure of financial records vary greatly from state to state, making it impossible to generalize about whether disclosure as part of a report to APS may violate a state's financial privacy rules. In some states, the law clearly permits disclosure to APS. For example, Nevada law provides that a financial institution may "in its discretion" initiate contact with and disclose "the financial records of a customer to appropriate governmental agencies concerning a suspected violation of the law."¹¹ Such a law would protect banks from liability for disclosure whether they are located in a mandatory or a voluntary reporting state.

In other states, the financial privacy law does not permit disclosure to APS. In these states, statutory amendments may be needed to make it clear that disclosure to APS by banks is lawful. For example, the state of Maryland recently amended its provision on "allowable financial disclosures by fiduciary institutions" to specify that disclosure to APS is an allowable disclosure:

Notwithstanding any other provision of law, a fiduciary institution or an officer, employee, agent or director of a fiduciary institution may disclose financial records and any other information relating to a customer of the fiduciary institution if the fiduciary institution...:

- (1) Believes that the customer has been subjected to financial exploitation; and
- (2) Makes the disclosure in a report to the adult protective services program in a local department of social services.¹²

Immunity Provisions in APS Statutes

Banks also frequently express concern that a customer will sue for damages in connection with a report to APS and the disclosure of the customer's private account information. With one exception,¹³ the state APS laws provide immunity from civil or both civil and criminal liability to reporters of abuse who act in good faith.¹⁴ If a bank falls within the scope of the immunity provision, the bank should be protected both from liability to the customer for alleged damages and from liability for violation of the state's financial privacy law, if it is applicable.

Some immunity statutes may not provide adequate protection to banks, however. The typical state immunity provision gives immunity to "any person" or "anyone" who makes a report of financial abuse. This raises the question of whether the immunity provision protects both the employee who makes the report and the bank or financial institution that employs the reporting employee (which is almost surely the intention of the statute) or whether only the employee is protected. The answer turns on whether the term "any person" or "anyone" refers only to individual people or whether it also

¹¹ NV ST §239A.070(3).

¹² MD FIN INST §1-306(b).

¹³ The South Dakota APS statute provides immunity only to institutions and "any employee, agent or member of a medical or dental staff thereof." SD ST §22-46-6.

¹⁴ Maine, Maryland, Michigan, New York, and Oregon provide only civil immunity. ME ST T. 22 §3479-A; MD FAMILY §14.309; MI ST 400.11c(1); NY SOC SERV §473-b; and OR ST §124.075.

includes corporations, associations and similar entities. In many states, the term “person” is interpreted broadly to include corporations and other entities. For example, a District of Columbia court stated: “Statutory use of the word persons to include corporations is so general that to hold corporations are not included requires clear proof of legislative intent to exclude them.”¹⁵ In some other states, there is a statutory provision that defines the term “person” for all state laws. To illustrate, the law in Washington, which is typical, provides that the “term ‘person’ may be construed to include... any public or private corporation or limited liability company, as well as an individual.”¹⁶

In states where the immunity provision is ambiguous or limited in its scope, leaving banks uncertain about whether they are fully protected, statutory amendments may be needed to clarify and expand its scope. In Texas, which has been attempting to implement a bank reporting program modeled on the Massachusetts and Oregon projects, the APS statute’s immunity provision was amended last year to reassure the banking community. The statute now specifically provides that an “employer whose employee [makes a report of elder abuse] is immune from civil or criminal liability on account of an employee’s report, testimony, or participation in any judicial proceedings arising from a petition, report, or investigation.”¹⁷ Similarly, the Georgia APS law provides that:

Any financial institution..., that is an employer of anyone who makes a report pursuant to this chapter in his or her capacity as an employee, or who testifies in any judicial proceeding arising from a report made in his or her capacity as an employee, or participates in a required investigation under the provisions of this chapter in his or her capacity as an employee, shall be immune from any civil or criminal liability on account of such report or testimony or participation of its employee....”¹⁸

¹⁵ Central Amusement Co. v. District of Columbia, 121 A.2d 865, 866 (D.C. App. 1956.)

¹⁶ WA ST §1.16.080.

¹⁷ TX HUM RES §48.054(d).

¹⁸ GA ST §30-5-4(c).

Conclusion

APS workers and advocates for elder abuse victims who wish to develop bank reporting programs will benefit from understanding that federal law poses no barrier to bank reporting projects. There may be legal impediments resulting from state bank privacy laws or APS statute immunity provisions, however. These problems can be resolved through minor amendments to state law(s) to protect banks from law suits by customers or potential liability under state financial privacy law.